United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2352

ORIGINAL

B

P/s

To be argued by
ROSS SANDLER

In The

United States Court of Appeals

For The Second Circuit

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELIN GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

vs.

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; ASSOCIATED HOSPITAL SERVICE, INC.; GROUP HEALTH INCORPORATED; UNITED MEDICAL SERVICE, INC.; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE, GROUP HEALTH INCORPORATED

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Docket No. 74-2352

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELIN GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

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(Continued on next page)

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Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE GROUP HEALTH INCORPORATED

PRELIMINARY STATEMENT

Plaintiffs-appellants appeal from a judgment dismissing the complaint herein with prejudice entered in the United States District Court for the Southern District of New York on October 10, 1974 on motion made *sua sponte* by the Hon. Whitman Knapp, United States District Judge. This brief is respectfully submitted on behalf of one of the defendants-appellees, Group Health Incorporated ("GHI").

STATEMENT OF FACTS

The action was commenced and the complaint filed on January 17, 1974. Plaintiffs are individual employees of the City of New York and its independent agencies, and an unincorporated organization allegedly representing employees of

the City of New York. The defendants are the City of New York, various City officials and independent agencies, unions, union welfare funds and two health insurance corporations providing medical and hospitalization insurance programs to the City. One of the insurance corporations is GHI on whose behalf this brief is submitted.

The complaint contains eleven separate claims for relief, only one of which, however, is directed towards GHI. Plaintiffs allege that GHI aided and abetted the defendant, City of New York, in committing discriminatory acts against women in violation of the United States Constitution and Title VII of the Civil Rights Act of 1964. The aiding and abetting occurred, so plaintiffs allege, when GHI "negotiated and entered into health . . . insurance contracts which discriminated in their provisions on the basis of sex . . ." (34a).* The complaint specifies that the discriminatory portions of the GHI medical insurance programs are those provisions which limit to specific maximums the amounts payable for normal maternity benefits (32a-33a).

Plaintiffs, in the remaining ten claims for relief, allege various acts of discrimination committed by the other defendants but not by GHI. These separate claims against the other defendants relate to hospitalization insurance, leaves of absence and disability benefits (Appellants' Brief, p. 4). GHI played no part in those allegedly discriminatory practices. Accordingly GHI will limit its discussion herein to the single claim made against it relating solely to medical insurance.

* Numbered references followed by "a" are to pages in the Joint Appendix.

GHI is a New York not-for-profit health service corporation organized pursuant to the provisions of Article IX-C of the New York State Insurance Law. On October 1, 1973, GHI began providing the City of New York with major medical and basic medical and surgical programs under two plans designated GHI and GHI (Type E) programs. GHI does not provide hospitalization insurance to the City. Under both GHI medical insurance programs GHI provides a specific allowance for obstetrical services in the case of normal pregnancy — $125 under the Type E program and $150 under the GHI program (213a, pp. 30, 49). If certain participating physicians are used, these allowances will be accepted as full payment (213a, p. 45).

Because of the limitations set forth in the payment schedules for normal pregnancy, plaintiffs alleged that the programs are discriminatory and deprive them "of equal terms and conditions of employment because of sex" (33a). The GHI medical programs, however, pay benefits to dependents of male employees at a rate identical to that paid to female employees. Dependents of an employee include, among others, the employee's husband or wife, unmarried children under age of 19, and unmarried children over 19 falling into certain categories (213a, p. 5). The City's total medical insurance program includes approximately 243,000 family contracts of which 167,000 are headed by male employees (208a). Thus while pregnancy is, of course, limited to women, there is no identity between the pregnancy classification found in the GHI medical programs and gender as such because both male and female employees receive the same allowance for the same medical event.

GHI is, and has always been ready, willing and able to provide greater obstetrical medical coverage. As stated in GHI's answer and its moving affidavit, if the City of New York accepts such greater coverage and pays the increased rate commensurate with the cost of such increased benefits, GHI is prepared to immediately provide the additional coverage (92a, 200a-201a).

On June 12, 1974, while the instant case was pending in the district court, the Equal Employment Opportunity Commission ("EEOC") dismissed charges lodged against GHI by two of the plaintiffs herein on the issue of medical insurance coverage (203a-206a). The EEOC held that it had no jurisdiction under Title VII of the Civil Rights Act of 1964 because GHI, as a vendor of medical insurance, was not an employer, labor organization or employment agency within the meaning of Title VII (204a, n. 2).

On June 11, 1974, the Supreme Court filed its opinion in *Geduldig v. Aiello,* 417 U.S. 484 (1974). The Court, in reversing a lower court, held that the California disability insurance plan which excluded normal pregnancy from benefits was constitutional. On June 26, 1974, Judge Whitman Knapp notified counsel that, in light of the opinion in *Geduldig v. Aiello, supra,* he would hear argument on July 11, 1974 as to whether he should, *sua sponte,* dismiss the complaint (232a). GHI appeared and filed papers in support of dismissal. In addition, GHI served a timely notice of motion and supporting affidavit urging the Court to dismiss the Title VII claim as against GHI for lack of jurisdiction and failure to state a claim for relief (195a-206a). It was GHI's position, following the lead of the EEOC, that Title VII liability could only be imposed upon

employers, employment agencies and labor unions, and that there was no basis in law for imposing liability upon a vendor of insurance under the statute. Plaintiffs did not file papers in opposition to GHI's motion.

After argument on July 11, 1974 with respect to Judge Knapp's notice, the district court filed an opinion holding in effect that under *Geduldig v. Aiello, supra,* plaintiffs' complaint failed to state a claim on which relief can be granted (290a-303a). Judge Knapp granted plaintiffs leave to amend their complaint. When plaintiffs elected not to amend their complaint, Judge Knapp granted judgment to all defendants dismissing the complaint with prejudice (313a-314a). Because the complaint was dismissed on the merits under *Geduldig v. Aiello,* Judge Knapp never had occasion to rule upon the independent motion by GHI to dismiss the Title VII claim as against it.

ARGUMENT

I.

Plaintiffs fail to state a claim against GHI upon which relief can be granted under Title VII of the Civil Rights Act of 1964.

There is no basis under Title VII for imposing liability upon an institution which is neither an employer, employment agency nor labor organization with respect to the victims of the unlawful discrimination.

Plaintiffs allege in their complaint that the medical programs chosen by the City for its employees discriminate against women. The sole claim alleged against GHI, a health

corporation providing the City's medical insurance programs, is that it "aided and abetted" the City's alleged discrimination against women when it negotiated and sold medical insurance programs to the City which provide disproportionately less medical benefits for normal pregnancy (34a). Plaintiffs, in making their claim for relief, rely most heavily on Title VII of the Civil Rights Act of 1964. 42 U.S.C. §2000e, *et seq.*

Plaintiffs' claim under Title VII is, however, defective as a matter of law as against GHI. Title VII provides no basis for imposing liability upon an institution which is neither an employer, employment agency nor labor organization. In the absence of that essential jurisdictional fact the complaint, insofar as it alleges Title VII violations against GHI, must be dismissed.

Title VII of the Civil Rights Act prohibits discriminatory employment practices but only by employers, employment agencies and labor organizations. 42 U.S.C. §2000e-2(a), (b) and (c). Section 2000e-5(g) explicitly limits accountability for back pay to "the employer, employment agency, or labor organization" responsible for the unlawful employment practice. The Act's only provision relating to accessorial conduct relates solely to acts done by a labor organization. 42 U.S.C. §2000e-2(c)(3).

The EEOC agreed that the absence of the essential jurisdictional fact mandates the dismissal of the complaint in this case. In dismissing two of the plaintiffs' charges against GHI, the EEOC declared:

> "Charging Parties Robertson and Boyarsky's sworn charges against the above noted Respondents are dismissed for lack of jurisdiction since, as insurance carriers, they are neither employers, labor organizations or employment agencies within the meaning of Title VII" (204a, n.2).

Similarly in *Brush v. San Francisco Newspaper Printing Co.*, 315 F. Supp. 577 (N.D. Calif. 1970), *aff'd.*, 469 F.2d 89 (9th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973), the court held that a newspaper publisher was not an "employment agency" within the meaning of Title VII when it published want ads, and it was therefore not subject to the sanctions of the Civil Rights Act.

The absence of the requisite jurisdictional fact requires dismissal of the complaint as against GHI with respect to the alleged Title VII violations without regard to the merits of the claim against the other defendants which, unlike GHI, are employers or labor organizations. Title VII does not permit an extension of liability to vendors as aiders and abettors. Such a theory would, as here, subject to administrative procedures, judicial proceedings and statutory remedies persons who have no direct ability or power to correct allegedly unlawful discrimination. The EEOC rejected such a theory in its review of the charge in this case (204a). Its determination is entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Accordingly the complaint was properly dismissed as against GHI insofar as it alleged a Title VII violation.

II.

Plaintiffs fail to state a claim upon which relief can be granted with respect to medical insurance for normal pregnancy.

There is no identity between the limited medical insurance coverage for normal pregnancy and gender as such. Both male and female employees receive identical medical insurance coverage — female employees for themselves and qualified dependents and male employees for their qualified dependents.

Plaintiffs allege that the medical coverage provided in the GHI and GHI Type E programs with respect to normal pregnancy discriminates against women because they provide allegedly more restrictive benefits than are provided for other medical occurrences. Plaintiffs claim unlawful sex discrimination under Title VII of the Civil Rights Act and the Fourteenth Amendment. The essential fact insofar as plaintiffs are concerned is that pregnancy, a female occurrence, is singled out for lesser benefits under the medical insurance plan. Plaintiffs suggest that because pregnancy is so singled out they have stated a viable claim for relief with respect to discrimination because the effect of the classification has an obvious disproportionate impact upon women (Appellants' Brief, p. 22).

Plaintiffs' reasoning is, however, wholly fallacious. The suggestion that the classification has an obvious disproportionate impact on women has been rejected by the Supreme Court with respect to disability insurance and a district court with respect to the identical issue raised here — medical

insurance coverage. *Geduldig v. Aiello, supra; Satty v. Nashville Gas Co.*, (M.D. Tenn. 1974), opinion annexed to Appellants' Brief, pp. 66-83.

In *Satty*, a Title VII case, plaintiff challenged defendant's policy of health insurance which provided less health and hospitalization benefits for pregnancy than for other kinds of medical conditions. However, as in the instant case, the pregnancy benefits applied equally to female employees and to dependents of male employees. The court rejected the challenge because the threshold fact of disparity of treatment was absent. The court declared that the insurance program had not discriminated unlawfully between male and female employees in the payment of medical expenses because employees, both male and female, receive the identical coverage:

> ". . . There is no doubt that the insurance program makes a distinction in the case of pregnancy as to the extent of benefits available. However, the pregnancy distinction applies to both male and female employee-beneficiaries of the plan. The insurance proceeds are paid on behalf of the employee, male or female, according to a single formula in all pregnancy cases. Thus, for a male employee whose wife is pregnant, the insurance benefit is the same as provided to a pregnant female employee such as plaintiff."

* * *

> "So far as the issue relating to the insurance program is concerned, the court finds no distinction in the application, operation, or effect of the insurance plan to support a finding of unlawful discrimination by reason of sex since all employees, male or female, receive the same benefit." (Appellants' Brief, pp. 68-69).

In order to prevail under Title VII, plaintiffs must show discrimination against female employees on the basis of sex; *i.e.*, disparity of treatment between male and female employees. Section 2000e-2(a)(1). Plaintiffs have failed to meet their threshold burden.

Plaintiffs have likewise failed to state a cause of action under the Equal Protection Clause of the Fourteenth Amendment. In *Geduldig v. Aiello*, the Supreme Court held that California's disability insurance plan, which excluded normal pregnancy from coverage, did not violate the Equal Protection Clause of the Fourteenth Amendment. The Court found no evidence in the record of discrimination:

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." 417 U.S. at 496-97.

As the Court elaborated in footnote 20 to its decision, there is no identity between the excluded coverage and gender as such:

> "Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." 417 U.S. at 496-97.

The GHI medical insurance programs challenged in the instant case are even more invulnerable to attack under the Equal Protection Clause than the disability program approved by the Supreme Court. In *Geduldig v. Aiello*, the Court found that one of the two groups of potential recipients consisted entirely of women, *i.e.*, pregnant women. In the instant case, however, both groups include members of both sexes. The group affected by the limitations on medical benefits in connection with pregnancy

consists of both pregnant female employees and male employees with pregnant dependents. The second group, as in *Geduldig v. Aiello*, consists of non-pregnant persons of both sexes.

Accordingly plaintiffs are wholly incorrect when they repeatedly assert that every classification on the basis of pregnancy results *ipso facto* in discrimination against female employees (*e.g.*, pp. 20-22, 34-35, 38-40, 44). Plaintiffs do not allege in their complaint nor explain in their brief how such a classification in a medical insurance program produces a discriminatory impact. They ignore the fact that classification of medical insurance coverage on the basis of pregnancy, just as on the basis of any other objectively identifiable physical condition, can affect male employees with female dependents as equally as it affects female employees. Accordingly, whether measured against Title VII of the Civil Rights Act or the Fourteenth Amendment, plaintiffs' claim was correctly dismissed because plaintiffs failed to establish the threshold fact of discriminatory impact.

As plaintiffs have failed to show unlawful discrimination against a protected class under the Equal Protection Clause, their purported limitation of *Geduldig v. Aiello* to legislative circumstances becomes inconsequential. In any event, the same rationale which justified California in excluding pregnancy from its disability program applies to the City's decision to limit maternity benefits under its medical insurance program. As in *Geduldig v. Aiello*, the City's financial resources are finite and its budgetary decision as to what to spend in connection with the compensation of its own employees has an integral effect on what is left over to pay for governmental services and programs.

The City's decision reflects an allocation of the limited resources the City has to spend for the benefit of all the citizens. *Geduldig v. Aiello, supra,* at 495-496.

CONCLUSION

The judgment dismissing plaintiffs' complaint should be affirmed.

Respectfully submitted,

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A 201 Affidavit of Service by Mail G LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS:2nd CIRCUIT

WOMEN IN CITY GOVERNMENT, et al,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, et al,

Defendants-Appellees,

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF ss.:

Doris F. Lutz, *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

2 Lancer Drive, Short Hills, New Jersey.

That upon the 25th *day of* Feb. 19 75 *, deponent served the annexed* Brief for Defendant-Appelle, Group Health

upon Gerald Barre *attorney(s) for*

Social Service Employees *in this action, at* 98 Cutter Mill Rd., Great Neck, New York 10021 *the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 25th *day of* Feb. 19 75

Doris F. Lutz

Print name beneath signature

DORIS F. LUTZ

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0410950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS: 2nd CIRCUIT

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Plaintiffs-Appellants,

- against -

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Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York *ss.:* New York

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 25th *day of* Feb. *19* 75 *at* * see attached

deponent served the annexed Brief for Defendant-Appellee, Group Health *upon* ** see attached

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) *herein.*

Sworn to before me, this 25th *day of* February *19* 75

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

AFFIDAVIT OF SERVICE (cont'd)

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